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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BODEGA LATINA CORPORATION D/B/A EL SUPER, Respondent, and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 324 Charging Party.	Case No. 21-CA-183276 **CHARGING PARTY'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. STATEMENT OF THE CASE

Despite El Super's persistent attempts to complicate the record, this case is straight forward. Mireya Beltran requested paid time off while on an FMLA-protected medical leave and El Super denied this request without explanation. Approximately one month later, Mr. Beltran's Store Manager Jose Luna inadvertently handed Ms. Beltran an email between management officials in which Mr. Luna argued that Ms. Beltran's request should be denied because she is "pro union." It is hard to imagine a more clear-cut violation of Section 8(a)(1) and (3) of the Act.

Nevertheless, El Super excepts to the Administrative Law Judge's well-reasoned opinion by raising a number of technical, and largely irrelevant arguments related to specific findings. El Super's exceptions do not so much oppose the Judge's reasoning, but rather attempt to re-litigate the case entirely. This must be because, as the Judge found, El Super's key witnesses produced testimony that was confused, contradictory, and not credible. El Super effectively asks the Board to disregard the Judge's credibility conclusions but "[t]he Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect." *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F2.d 362 (3d Cir 1951); *United States Postal Serv. & Nat'l Postal Prof'l Nurses*, 355 NLRB 368, 369 (2010). Moreover, the exceptions process is meant to address prejudicial error in the trial process, not give the Employer another bite at the apple before a different tribunal after their witnesses acquitted themselves poorly at the hearing.

A review of the Judge's opinion and the record makes clear that the Judge had ample evidence to support his conclusions that underpin this case. For this reason, the Board should adopt the Judge's decision and reject El Super's exceptions.

A. Facts

Mireya Beltran was an open and active supporter of the Union. Ms. Beltran regularly participated in Union activities, wore a Union button to work during contract negotiations, and participated in a one-day strike called by the Union in December 2015, just a few months before the events in question. Tr. 104:13-15, 105:11-106:7, 107:3-4, 104:13-105:9 (Beltran); 60:22-25 (Perez). Jose Luna, the Store Manager and highest-ranking management official at the Store, was well aware of Ms. Beltran's Union activity and support, having previously questioned her about the Union button and observed her participating in the strike. Tr. 106:1-107:4, 107:16-108:3 (Beltran); Tr. 34:6-14 (Perez). His email to human resources representative Angelica Lima reflects his knowledge that Ms. Beltran is "pro-union." GCX6.

On March 22, 2016, Ms. Beltran was told by her doctor that she needed to undergo a medical procedure the following day that would cause her to miss work for several days.[1] Tr. 127:2-12 (Beltran). She therefore went, in-person, to the office of her Store Manager Jose Luna and requested paid time off. Tr. 108:13-24 (Beltran). During this meeting, Ms. Beltran presented a note from her doctor, explained that she would be going on a brief medical leave of absence, and completed the paperwork for receiving paid time off that she received from Mr. Luna. Tr. 109:8-109:22, 127:20-128:5 (Beltran). On March 23, the following day, Ms. Beltran had surgery. Tr. 126:23-127:1 (Beltran).

Three or four days later, while still on leave and recovering from her operation, Ms. Beltran received a call from Mr. Luna. Tr. 111:15-17 (Beltran). Mr. Luna informed Ms. Beltran that she would not be able to use her paid time off while on her medical leave of absence. Tr. 111:18-20 (Beltran). Mr. Luna did not provide any explanation for this denial. Tr. 111:19-112:10

[1] Unless otherwise stated, all subsequent dates occurred in 2016.

(Beltran). On March 28, believing the denial of her vacation to be unfair, Ms. Beltran contacted her Union representative Jose Perez and informed him of the situation. Tr. 42:15-43:7 (Perez). Mr. Perez emailed his contact at the Company, Human Resources Specialist Angelica Lima, and asked if Ms. Beltran would receive the paid time off she had requested. GCX4. Ms. Lima replied the same day at 5:59 p.m. that she would check Ms. Beltran's vacation balance and "circle back." *Id.*

That evening, at 7:39 p.m., a Payroll Supervisor for El Super named Norma Macias sent an email with subject heading "Mireya Beltran" to Ms. Lima, copying Jose Luna, with the message "Available vacation 95.53hours." GCX6. After Angelica Lima responded "Thanks Norma" the next morning (March 29) at 8:21 a.m., Jose Luna responded, nine minutes later, saying:

> Angelica
>
> Can you please call me tomorrow before we decide to pay her. The contract states she needs to give us 30 day notice . [sic] She is pro union and calls in sick in sick [sic] on us a lot.
>
> Jose Luna #11
> Sent from my T-Mobile 4G LTE Device

GCX6 (this email string is referred to hereinafter as the "March 29 Email").

El Super did not pay Ms. Beltran pursuant to her PTO request after this email string. Having heard no response from Ms. Lima following his March 28 inquiry, Mr. Perez, on April 5, sent a follow up email to Ms. Lima about Ms. Beltran's vacation pay request. Tr. 43:5-12 (Perez). Ms. Lima responded the same day, and informed Mr. Perez that Ms. Beltran would "not be paid for vacation," with the confusing explanation that "[s]he's on a medical LOA, she can

apply for FMLA." GCX5. Mr. Perez followed up seeking clarification and further explanation, but did not receive any response from Ms. Lima. Tr. 50:10-15 (Perez); GCX5.

In early April, Ms. Beltran went to Mr. Luna's office and asked Mr. Luna for an accounting of her available vacation hours. Tr. 112:21-113:2 (Beltran). In response to this request, Mr. Luna handed Ms. Beltran the email string detailed above between him, Ms. Lima, and Payroll Manager Norma Macias, apparently forgetting that in it, Mr. Luna had advocated against her request on the grounds that Ms. Luna is "pro-union." GCX6; EX1.

About a month later, Ms. Beltran, who has a limited English-reading skills, discovered that the March 29 Email she received from Mr. Luna indicated that her paid time off request had been denied because she supported the Union. Tr. 114:12-115:21 (Beltran). Ms. Beltran then took the document containing the March 29 Email to Mr. Perez. Tr. 115:22-116:4 (Beltran). Mr. Perez reviewed the document, and, upon discovering the true reason the Company had denied Ms. Beltran's paid time off request – because she is "pro union" - filed a grievance. Tr. 47:7-8 (Perez); GCX6.

B. Decision

The Judge correctly found that the General Counsel met its *prima facie* burden of making out a violation of Section 8(a)(3) under *Wright Line. Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd.* 662 F.2d 899 (1st Cir. 1981), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Specifically, the Judge found: (1) that Ms. Beltran properly requested paid time off on March 22; (2) that El Super, and Store Manager Jose Luna specifically, exhibited union animus; (3) that Ms. Beltran was never actually paid pursuant to her request; and (4) that the settlement payment in April did not affect El Super's obligation to provide Ms. Beltran with paid time off pursuant to her request. Decision

of Administrative Law Judge Etching in Case 21-CA-183276 ("ALJ Dec.") at 10:1-11:35, fn.10 (requested time off); ALJ Dec. 26:1-29:33 (animus); ALJ Dec. at 28:10-26 (never paid per request); ALJ Dec. at 28:23-26 (settlement payment unrelated). None of El Super's 70 exceptions or arguments in its 50-page brief call into doubt these essential facts.

The Judge further found that El Super failed to carry its rebuttal burden under *Wright Line*. Specifically, the judge rejected El Super's attempt to show that the decision to deny Ms. Beltran's request was made by someone other than Mr. Luna who was not infected by anti-union animus. Significantly, if someone other than Mr. Luna made the decision, the Company certainly failed to produce this individual to testify on this point or explain *why* they made this decision at the hearing. Likewise, the Judge correctly rejected El Super's purported business justifications that it *did* pay Ms. Beltran pursuant to her request, or alternatively, that it could not pay Ms. Beltran because it would complicate a settlement payment in a separate unfair labor practice cases (21-CA-126665 et. al.), since these arguments are contradicted by the Parties' stipulations of fact in this case (JX1) which provide that that this settlement payment in the separate unfair labor practice cases was completely unrelated to Ms. Beltran's paid time off request.[2]

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[2] The Parties' stipulations make clear that "[t]he current vacation payout provision applicable to UFCW Local-represented employees requires that 'the [e]mployer shall pay the employee the vacation pay accrued during the employees anniversary year, either prior to taking the vacation or on the employee's anniversary date.'" JX1. Thus employees have one year to use vacation accrued the prior year before it automatically becomes due "on the employee's anniversary date." *Id.* The stipulations further states that Ms. Beltran's April 8, 2016 payment "covered 72.27 hours of vacation pay accrued through April 8, 2014 and unused through April 8, 2015," when it became "due and owing" on her anniversary date, "as of April 9, 2015." *Id.* Thus, as of April 9, 2015, Ms. Beltran no longer had these hours available to use for paid vacation, they were simple "due and owing." Likewise, any paid vacation taken by Ms. Beltran after April 9, 2015 would therefore not affect the "72.27 hour total" she was owed as of April 9, 2015, but would be subtracted from her then-available vacation account balance. The fact that Ms. Beltran received payment for vacation hours that had been due and owing as of "April 9, 2015" not long after her request to use her then-available paid vacation hours on March 22, 2016 is merely a coincidence. The stipulations make clear that this amount had been "due and owing" for a year, and that their

The Judge thus correctly concluded that El Super violated Section 8(a)(3) and (1) of the Act. Based on the fact that El Super's exceptions do not call into question any of the facts necessary to establish a prima facie case of discrimination under *Wright Line*, and El Super's thoroughgoing failure to discharge its rebuttal burden under *Wright Line*, the Board should adopt the Judge's ruling and reject El Super's exceptions even without addressing the arguments proffered in its Brief in Support of those exceptions.

A review of El Super's exceptions and supporting arguments, however, reveals that they lack merit. The Company tries to complicate the record by articulating numerous different types of vacation requests an employee might make, falsely suggesting that an unrelated settlement agreement somehow absolved it of its obligation to honor Ms. Beltran's request, and asserting that the "true" decision maker was someone other than Mr. Luna while failing to present that person to testify or explaining how or why that person rejected Ms. Beltran's request. However, it is undisputed that on March 22, Ms. Beltran requested to be paid during her medical leave. El Super was obligated by federal and state leave law, which is incorporated into the parties' CBA, to honor that request. *See* 29 U.S.C.A. § 2612(a)(1)(D) (West); Cal. Gov't Code §12945.2(c)(3)(C) (West). Yet El Super failed to do so. Furthermore, as the Parties stipulated, the settlement payments to which El Super attempted to recur in its defense were completely unrelated to Ms. Beltran's request for paid time off. Finally, as the judge found, the evidence establishes that Mr. Luna *was* the decision maker, or at least influenced the decision, and this fact was never rebutted by the Company. El Super's exceptions are therefore either unsupported by record evidence or irrelevant.

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payment was a result of "a settlement agreement" reached between the Employer and the Union, not Ms. Beltran's March 22, 2016 request for paid time off.

The Board should therefore dismiss El Super's exceptions and adopt the Judge's decision that the Employer violated Sections 8(a)(1) and (3) of the Act.

II. ARGUMENT

The Judge correctly found that El Super violated the Section 8(a)(3) of the Act under *Wright Line*. Under the *Wright Line* standard:

> The General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *United Rentals*, 350 NLRB No. 76, slip op. at 1 (2007) (citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)).

SFO Good-Nite Inn, LLC, 352 NLRB 268, 269 (2008);[3] *see also Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

To make out a *prima facie* case, the General Counsel must show the existence of protected activity, knowledge of that activity by the employer, and union animus. *SFO Good-Nite Inn, LLC,* 352 NLRB at 276. Proof of these elements by the General Counsel warrants at least an inference that the employee's protected conduct was a motivating factor in the adverse personnel action and that a violation of the Act has occurred. *Id.*; *Nordstrom dba Seattle Seahawks*, 292 NLRB 899 (1989). While all three factors are required in most cases, where the evidence is particularly strong, "[a] showing that unlawful motivation played a role suffices." *Id.*

In this case, the General Counsel's *prima facie* case that El Super discriminatorily denied Ms. Beltran's request for paid time off while on medical leave is readily established because: (1)

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[3] *SFO Good-Nite Inn, LLC*, 352 NLRB 268 (2008) was decided by a two-member Board but was reaffirmed in relevant part by a three-member panel at 357 NLRB 79 (2011) following the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

Ms. Beltran was an open and vocal supporter of the Union who wore Union buttons and participated in a strike;[4] (2) El Super was aware of Ms. Beltran's Union support, as Jose Luna's email reflects, because Ms. Beltran engaged in these pro-Union activities openly and Mr. Luna had even questioned Ms. Luna about the Union button she wore during contract negotiations;[5] and (3) the March 29 Email constitutes a clear admission that Ms. Beltran's "pro union" sentiment "played a role" in the decision not to "pay her," thereby exhibiting union animus on the part of the Employer. El Super's anti-union animus is further evidenced by its past unfair labor practices (*see* GCX1, subpart L(I), Sec. VI(7): "[t]he Respondent agrees that this Settlement Stipulation may be used in any proceeding before the Board or an appropriate court to show proclivity to violate the Act for purposes of determining an appropriate remedy") and contemporaneous 8(a)(1) violation in this case. ALJ Dec. at 30:19-31:10; *see, e.g., Amptech, Inc.*, 342 NLRB 1131, 1135 (2004) (proof of an employer's animus may be based on circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices). Indeed, the March 29 Email alone establishes all three elements of the General Counsel's *prima facie* case. Thus, as the Judge easily found, the General Counsel carried its burden of making out a *prima facie* case of a violation of 8(a)(3) and (1).

A. Ms. Beltran Requested To Be Paid During Her Time Off At The Time She Requested Time Off For Her Medical Procedure (Employer Exceptions 1-2, 8-9, 11-13, 16-19, 20-28, 31, 33-34, 38, 43-44, 46, 48-50, 54, 58, 64-67, 72, 82)

While the Employer devotes much of its brief to arguing that the Judge made incorrect conclusions regarding the specific type of paid time off that Ms. Beltran requested, this is ultimately immaterial. This is because none of El Super's arguments negate the uncontroverted

[4] Tr. 105:11-106:7 (wore Union button); tr. 104:25-105:9 (participated in strike)
[5] Tr. 106:1-107:4 (Mr. Luna questioned Ms. Beltran about Union button); tr. 34:6-14, 107:16-108:3 (Mr. Luna observed Ms. Beltran's participation in strike)

facts that: (1) Ms. Beltran requested that she be paid during her medical leave on March 22; (2) Ms. Beltran filled out the appropriate paperwork to do so provided by her supervisor Mr. Luna; and (3) Ms. Beltran's request was ultimately denied without any legitimate reason given.

The Employer has gone to great lengths to complicate this picture by discussing what it purports are different ways in which paid time off can be requested. The Employer, for example, refers alternatively to requests to use accrued vacation time as "paid vacation time off," "paid time off," "time off," "vacation payout," "Medical LOA" and even just "FMLA." Brief in Support at 7; GCX5. The Judge correctly observed that the Employer described an "elaborate process" for maintaining records related to various vacation requests, and arcane procedures for determining which type of leave an employee has requested. *See* Brief in Support at 7-9 (asserting that the tense an employee uses in making the request is relevant to the inquiry); ALJ Dec. at 22:15-30. The name ascribed by the Employer to the specific type of paid time off that Ms. Beltran requested, however, is immaterial to the instant case. What is significant, and uncontroverted by credible evidence, is that Ms. Beltran requested to use her paid time off during her medical leave when she spoke with Store Manager Jose Luna on March 22, and completed the documents necessary to do so when Mr. Luna provided them to her in response to Ms. Beltran's request.

El Super, in its Brief in Support, states that "[n]o evidence supports Beltran's testimony that she requested paid time off when she handed in her doctor's note." Brief in Support at 10. First, Ms. Beltran's testimony is evidence itself, and the Judge credited her testimony. ALJ Dec. at 20:36-41. Furthermore, there was no credible evidence that *contradicts* this testimony. Ms. Beltran's testimony on this point was compelling and credible. As the Judge concluded, "Beltran testified in a generally corroborative and credible manner exhibiting a straightforward and no-

nonsense demeanor that she turned in her doctor's note to Manager Luna on March 22 and he handed her a blank time off request form that she filled out, signed, and turned in to him to receive unused accrued vacation paid time off for the dates March 23–26, 2016 because Beltran's doctor instructed Beltran that she would need to miss 2 weeks work and have an emergency surgery on March 23." ALJ Dec.at 20:35-41. The Judge further found that "Beltran was much more believable than Supervisors Ruiz and Lima." *Id.* at 41-42.

In contrast, the *only* evidence that El Super offered at the hearing to contradict Ms. Beltran's detailed, thorough account that she requested paid time off and completed the required paperwork when she submitted her doctor's note, was (1) the testimony of Assistant Store Director Ruiz, and (2) the fact that they could not find the paperwork for the request after searching their records. As the Judge correctly concluded, neither of these pieces of evidence warrants any weight.

The Judge correctly gave little weight to the Company's failure to locate the vacation request form after a "diligent search." ALJ Dec. at 21:5-20, fn. 11. Indeed, after a similar "diligent search of the documents that the company had access to," the Company initially failed to produce the doctor's note that Ms. Beltran submitted, only "discovering" and producing this document after its witness testified to its existence on the second day of hearing. Tr. 199:22-207:25. Moreover, El Super failed to locate or produce this document despite a subpoena requesting "Mireya Beltran Pineda's personnel file" and "[a]ll documents concerning Mireya Beltran Pineda's request, made around March 2016, to use accrued vacation benefits during a leave she required for medical reasons." Tr. 20:3-11. The fact that El Super lost the doctor's note, a key document *submitted at the same time and for the same purpose as the vacation request form* provides more than sufficient grounds to conclude that the vacation request form

was also misplaced. Moreover, even if the Employer had not failed to locate related evidence, absence of proof is certainly not proof of absence, particularly in light of the fact that Ms. Beltran "confidently testified" to the contrary. ALJ Dec. at fn. 11. Finally, as the judge observed, El Super was even willing to stipulate to the existence of this document at the time of the hearing, asserting that it was "not central or even tangential to the issues," but now, in its exceptions, attempts to rely on the absence of this document as a key indicator that Ms. Beltran never requested time off. *Id.;* Tr. 23:2-13. For these reasons, the Company's failure to locate Ms. Beltran's vacation request form was appropriately given little to no weight by the Judge.

In addition, the Judge correctly found that Assistant Store Director Ruiz "was a highly suspect witness when it came to his recollection of the March 22 meeting." ALJ Dec. at 21:4-5. The Judge noted that Mr. Ruiz "appeared overly rehearsed and self-serving, as to the key facts from March through August 2016 and Respondent's procedures for approving or denying paid time off requests and Manager Luna's repeated authority to approve them or provide deciding input for employee time off requests." ALJ Dec. at 20:41-45. The Judge also correctly noted that Mr. Ruiz's assertion "that it took Beltran at least 3 minutes to just hand in her doctor's note to Manager Luna and leave without saying anything" was completely "unbelievable," and that it was much "more reasonable to believe that on March 22, it took Beltran 3-5 minutes to fill out the time off request form that Manager Luna provided her and hand in both this completed form and her doctor's note." ALJ Dec. at 21:14-18; Tr. 183. Thus, Mr. Ruiz's demeanor and manner in testifying, combined with his unbelievable assertions and "wealth of evidence contradicting his testimony" led the Judge to correctly "reject his lone testimony that Beltran did not submit a completed time off request on March 22." ALJ Dec. at 21:8-24.

Thus, as the Judge correctly found, Ms. Beltran requested to use paid time off while on medical leave and completed the appropriate paperwork to do so, per her supervisor's instructions, while in his office on March 22. It is irrelevant whether the Company deems such a request to be "paid vacation time off," "paid time off," "vacation payout," or "FMLA," and any error made by the judge related to the term applied by the Company is immaterial to its holding.

Moreover, this finding, combined with the March 29 Email and the fact that Ms. Beltran was never paid, is sufficient to satisfy the General Counsel's *prima facie* showing of a violation under *Wright Line*. As discussed elsewhere in this brief, El Super failed to discharge its rebuttal burden under *Wright Line*.

B. The Decision Maker Exhibited Union Animus (Employer Exceptions 1, 8-9, 11, 16, 29-30, 36-37, 39, 47-49, 51-53, 56-57, 62, 66, 70, 82

1. There Is Ample Evidence In The Record To Support The Judge's Conclusion That Mr. Luna Made The Decision To Deny Ms. Beltran's March 22 Paid Time off Request

El Super next tries to attack the Judge's finding that the decision maker harbored the required animus to make out a violation of Section 8(a)(3), but the Judge correctly concluded that both El Super, and its agent, Store Manager Jose Luna, harbored union animus.

The Company first argues that, because of the specific type of paid time off requested, Store Manager Jose Luna lacked authority to determine whether or not to allow Ms. Beltran to use her accrued vacation time while on medical leave. Brief in Support at 12. This is undoubtedly because the Company realizes that it cannot deny the clear union animus expressed in Mr. Luna's March 29 Email. However, as the Judge noted, the assertion that Mr. Luna lacked the power to deny Ms. Beltran's request contradicts the uncontroverted evidence offered by the General Counsel to the contrary. Significantly, as the Judge noted, Mr. Luna himself "reasonably believed that he was part of the decision-making team for approving or denying" paid time off

requests, given that he inserted himself in the decision-making process in the March 29 Email, asking Ms. Lima to "call him the next day 'before we decide to pay her [Beltran].'" ALJ Dec. at 25:21-23. Likewise, as the Judge noted, "Store managers freely approved" paid time off requests "at store#11 from 2015 through at least April 2016 and Respondent's payroll department's role was simply to rubber stamp the store managers' approvals as long as an employee had some unused vacation hours." ALJ Dec. at 25:14-17 (citing Tr. 111-112, 148-152, 197, 217-218; GCX9 and GCX10). The Judge reached this conclusion by relying on substantial evidence, citing *inter alia* numerous paid time off requests from employees submitted by the General Counsel (GCX9 and GCX10), in establishing that "Manager Luna routinely approved all paid time off requests without any input from newly arrived VP Santillan or general counsel Angulo as Manager Luna's paid time off request submittals were all approved and rubber-stamped by payroll in 2015-2016. . . [m]oreover, Supervisor Lima admits that vacation requests are generally approved if an employee has 'some' hours available" as Ms. Beltran undisputedly had here. ALJ Dec. at 22, n. 22. Thus there was clearly sufficient evidence to support the conclusion that Mr. Luna made the decision to deny Ms. Beltran's vacation request.

The Judge also correctly found that the testimony from Ms. Lima and Mr. Santillan regarding who approves paid time off requests at Store #11 lacked credibility and was of little evidentiary value. With respect to Ms. Lima, the Judge correctly observed that her testimony is of little to no value given that Store Director Luna's role in approving vacation requests generally, and the vacation request at issue here specifically, "predated Supervisor Lima's arrival at store# 11 on or about March 28, 2016." Opinion at 22:1-2 (citing Tr. 245). While Ms. Lima may have known about the Company's general practices, she "is unqualified to testify as to exact process for approving time off requests [at Store #11] especially ones that were requested prior

to her arrival the week of March 27th." Opinion at 22:32-35. The same is true with respect to Labor Relations Vice President Santillan, who has never worked at or directly supervised the employees of Store #11. The Judge noted that "VP Santillan, like Supervisor Lima, joined Respondent in mid to late March 2016, after many of the key facts in this case occurred." Opinion at 21:4-7 (emphasis original). The Judge therefore correctly "reject[ed] his further testimony and Supervisor Lima's testimony about their knowledge of Respondent's practice of approving time off requests, the authority of store directors/managers to approve or influence time off request approval, and Respondent's maintenance of employee records and personnel files prior to Manager Luna's departure from Respondent sometime after mid-April 2016." *Id.* at 22:16-20.

In addition to finding that they lacked credibility, the Judge also correctly observed that Ms. Lima and Mr. Santillan's description of the process was contradicted by substantial evidence and inherently unbelievable. The Judge observed that the notion that paid time off requests are approved at the "corporate office without any weight or material influence given by a store manager . . . contradicts the circumstances here where Manager Luna at first ignored and refused to process Beltran's March 22 time off request, then called Beltran at home 3-4 days later. . . and told her that her time off request was denied by Respondent's HR department." ALJ Dec. at 21:25-30. As the Judge observed, neither the delay in processing the request nor Mr. Luna's call were controverted by any of the evidence produced by El Super. ALJ Dec. at fn. 19. In addition, the Judge noted how the Company's explanation of the process – that all vacation requests such as Ms. Beltran's are approved by the Company's Corporate Counsel Angulo – was absurd: "[i]t is unreasonable to believe that general counsel Angulo has responsibility for day-to-day approval of Respondent's over 2,600 employees' time off requests." ALJ Dec. at 23:19-22.

Thus, the Judge had ample, uncontroverted evidence upon which to conclude that Mr. Luna was the decision maker that denied Ms. Beltran's vacation request. At the very least, as the Judge found, the General Counsel carried its *prima facie* burden by showing (1) Ms. Beltran supported the Union support, (2) that the Employer as an entity, by and through its supervisor and agent Store Director Luna, was aware of Ms. Beltran's Union support, and (3) that El Super rebutexhibited union animus. As the Judge stated:

> [g]iven the rebuttable presumption that a supervisor's knowledge of protected union activities is imputed to the employer, and given Manager Luna's regular active role in approving or denying Beltran's and other employees' time off requests, I find that the General Counsel has carried its burden by a preponderance of evidence in demonstrating that Respondent had knowledge of Beltran's protected union activities. See *Club Monte Carlo Corp.*, 280 NLRB 257, 45 261 (1986), enfd. 821 F.2d 354 (6th Cir. 1987).

ALJ Dec. at 25:40-45. The Judge continued by observing that this showing was sufficient to create the presumption that "[t]he denial [of Ms. Beltran's vacation pay request] came about from Manager Luna's input, either denying the paid time off request or persuading Respondent's HR department that because Beltran was a prounion employee, Respondent should either deny or delay approval of Beltran's March 22 time off request." Opinion at 21:30-35 (citing GCX6).

El Super's suggestion that someone other than Jose Luna, who exhibited incontrovertible union animus in the March 29 Email, made the decision to deny Ms. Beltran's request for vacation pay during her medical leave, is an effort to rebut the *prima facie* case, established by the General Counsel and Charging Party, that El Super's actions were unlawfully discriminatory. El Super bears the burden of persuasion, under *Wright Line*, to show that it would have made this decision irrespective of Ms. Beltran's union activity. *See, e.g., SFO Good-Nite,* 352 NLRB at 269.[6] It fell far short of discharging that burden when it failed to even positively identify the

[6] *See* n.2, *supra.*

decision maker, let alone present testimony from the decision maker to explain why El Super made the decision to deny Ms. Beltran's request.

2. El Super Failed To Carry Its Rebuttal Burden Of Showing That Someone Other Than Mr. Luna Made The Decision To Deny Ms. Beltran's Request, And That This Person Was Not Motivated By Union Animus

After the General Counsel establishes a *prima facie* case, the "burden of persuasion" shifts to the Company to prove that "it would have taken the same adverse action even in the absence of the protected activity." *SFO Good-Nite Inn*, 352 NLRB at 269.[7] "If, however, the evidence establishes that the reasons given for the employer's action are pretextual – that is, either false or not in fact relied upon – the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis." *Id.* (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enf'd.* 705 F.2d 799 (6th Cir. 1982)). Moreover, in *Wright Line,* 251 NLRB at 1087–88 (1980), the Board explained that "the shifting burden analysis. . . . represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation."

Thus, after a *prima facie* case has been established, it is the Employer, and not the General Counsel, that must show that the true motivation for the decision did not involve union animus. It is not enough to articulate a legitimate nondiscriminatory reason. The employer must affirmatively introduce enough evidence to persuade the Board that the challenged personnel action would have taken place regardless of the employee's protected activity and the employer's union animus. *Hyatt Regency Memphis* , 296 NLRB 259; *Hicks Oils & Hicksgas*, 293 NLRB 84 (1989); *Roure Bertrand Dupont*, 271 NLRB 443 (1984). If insufficient evidence is offered, or if

[7] *See* n.2, *supra.*

the evidence is unpersuasive, the employer will not have met its *Wright Line* burden and a violation will be found. *R.E.C. Corp.*, 296 NLRB 1293 (1989); *F & E Erection Co.*, 292 NLRB 587 (1989).

Here, El Super claims that a senior management official, not Jose Luna, made the ultimate decision to deny Ms. Beltran's request in an effort to distance the decision from Mr. Luna, who was unmistakably guided by union animus as reflected in the March 29 Email, *but it failed to produce this official to testify.* Angelica Lima suggested that only Labor Relations Vice President Victor Santillan or General Counsel Joe Angulo had authority to grant or deny Ms. Beltran's request – a notion that the Judge rejected due to contrary evidence and its inherent implausibility – and Victor Santillan did not state or otherwise indicate that he made the decision in this case. Tr. 224:22-25; ALJ Dec.at 23:19-21. While no one actually testified that Joe Angulo made the decision in this case, reading between the lines of El Super's equivocal evidence, it would appear that El Super contends that Joe Angulo denied Ms. Beltran's request in this case. He is still employed by the Company and subject to their control, yet El Super failed to produce him as a witness. While the Company asserts that having Mr. Angulo testify would require it to divulge information protected by the attorney-client privilege, it is unclear how the privilege would be implicated here, given that this was an employee's routine vacation pay request that El Super seems to contend that he denied. Moreover, the Company failed to produce any evidence to show that Mr. Angulo himself was not motivated or influenced by Union animus or Jose Luna's anti-union plea in the March 29 Email. Indeed, the *only* evidence provided by the Company on why the decision was made comes from the testimony of Ms. Lima, which the Judge rejected as lacking credibility. Furthermore, Ms. Lima's testimony on this point, as described below, makes no sense. Finally, the Company failed to offer evidence that, to whatever

extent Mr. Angulo is ultimately responsible for such decisions, that his approval was anything more than a rubber stamp. As the Judge observed, "the Board does not protect uninvolved employers who green light the animus-laden decisions of their inferiors." ALJ Dec. at 25:34-38, *citing Dobbs International Services*, 335 NLRB 972, 973 (2001) (whether the general manager knew of employees' protected activity was immaterial insofar as the supervisors, who were involved in the adverse action, knew of employees' protected activity).

Alternatively, the Company could have offered the testimony of Mr. Luna himself to explain that he did not make the decision to deny Ms. Beltran's request, but it did not even attempt to do so. Although El Super represented that Mr. Luna no longer works for the Company, it could have easily subpoenaed Mr. Luna's testimony, but did not even attempt to do so. Again, no explanation is provided as to why the Company failed to produce this key witness. That is a failure on El Super's part to produce evidence it needed to discharge its rebuttal burden under *Wright Line*; that cannot redound to the General Counsel's or Charging Party's detriment.

Thus, as the Judge found, El Super failed to carry its burden of showing that it would have made the decision to deny Ms. Beltran's request for vacation pay regardless of Ms. Beltran's protected activity. Although it argued that the decision was made by someone other than Mr. Luna, who demonstrated his anti-union animus in writing, El Super produced virtually no evidence on this point.

C. The Payment Made In April Pursuant To An Unrelated Settlement Agreement Has No Bearing On El Super's Obligation To Provide Ms. Beltran With Her Vested Vacation Benefits Upon Request (Employer Exceptions 1, 5, 30, 32, 40, 42, 59, 60-63, 69-71, 82-84)

El Super next makes the nonsensical argument that Ms. Beltran suffered no adverse employment action because she received a payment on April 8 of $1,031.02 pursuant to an unrelated settlement agreement. Brief in Support at 13-16, 25-27. The Judge correctly found

"that the April 8 payment is unrelated to Beltran's March 22 time off request since it is a settlement payment owed to Beltran and other union employees since August 7, 2015 and finally paid with interest on April 8, 2016." ALJ Dec. at 17 n.19. Indeed, the Employer admits in its Brief in Support that "Bodega Latina paid Beltran that amount as the result of a carefully negotiated settlement between the Company, Region 21, and the Unions representing employees at seven stores." Brief in Support at 13. Moreover, *the parties stipulated* that this settlement amount was, with respect to Ms. Beltran, "due and owing as of April 9, 2015," well before Ms. Beltran made her request, and concerned vacation hours that were "accrued through April 8, 2014 and unused through April 8, 2015." JX1 ¶7.

This stipulation makes clear, as the Judge found, that El Super was obligated to pay the amounts it paid to Ms. Beltran on April 8 irrespective of the request she made on March 22 for paid time off. Thus, Ms. Beltran was entitled to *both* the paid time off that she properly requested on March 22 *and* the unrelated settlement payment of April 8. El Super's claim in its Brief in Support that the April 8 payment "was related in both time and substance" to Ms. Beltran's request is incorrect. This claim is contrary to El Super's own stipulation regarding the April 8 payment, which establishes that the April 8 payment would have taken place irrespective of Ms. Beltran's March 22 request. Likewise, El Super's claim that it "paid Beltran [on April 8] *nearly twice* the amount of money she requested" is inapposite since, as established by the parties' stipulations, El Super owed the amount it paid on April 8 irrespective of Ms. Beltran's March 22 request – these are wholly unrelated amounts. This line of argument speaks to El Super's repeated attempts to complicate the record to hide the weaknesses of its case. Ms. Beltran was, as the parties' stipulations make plain, entitled to the amount she received on April 8, *plus* the amount she requested in paid time off on March 22.

El Super also points to the unrelated April 8 payout in a misguided effort to advance a legitimate business reason for denying Ms. Beltran's request. It suggested that honoring Ms. Beltran's March 22 request would have disrupted the settlement agreement in the other unfair labor practice case. Again, the Judge properly rejected this argument by concluding, per the Parties' stipulations, that the April 8 payment was unrelated to Ms. Beltran's March 22 request. Although the Employer claims that paying Ms. Beltran pursuant to her March 22 request would have required it "to recalculate the entire settlement payment it was about to make" on April 8, this is patently false. As the Parties stipulated, the April 8 payment "covered 72.27 hours of vacation pay accrued through April 8, 2014 and unused through April 8, 2015." JX1 ¶7. Thus any paid time off provided after April 8, 2015 would have had no effect on the settlement payment El Super made on April 8, 2016. Upsetting the "carefully negotiated agreement" can therefore not serve as a legitimate business justification, as the Judge found; in fact, this argument is transparently pretextual. Brief in Support at 27.

In sum, El Super's arguments related to the April 8 payment are both nonsensical and false, as reflected in the parties' stipulations, and the Judge properly rejected these arguments.

D. Evidentiary Conclusions

1. The ALJ Did Not Error By Prohibiting Bodega Latina From Questioning Ms. Beltran Regarding What Medication She Was Taking (Employer Exceptions 79-80, 82, 86)

The Judge correctly prohibited El Super from questioning Ms. Beltran about what medication she was taking on March 25 or 26 when Mr. Luna called her and informed her that her paid time off request had been denied, because this information is far more prejudicial than it is probative. Under Federal Rule of Evidence 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:

unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Here, the Judge correctly found that requiring Ms. Beltran to testify as to what medication she was taking following her medical procedure clearly would have created undue prejudice that far outweighed the minimal probative value of this line of questioning.

Ms. Beltran has a privacy interest in her health information, including the type of medication she may have been taking. *See, e.g., Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality").While the Judge correctly noted that Ms. Beltran put her health information "*as of March 22*" at issue "when Beltran's doctor's note and March 22 time off request was subpoenaed from Respondent," this was only put at issue to the extent it is necessary to confirm that Ms. Beltran's leave was taken for medical reasons. ALJ Dec. at 12 n. 13 (emphasis added). Furthermore, only her health information *as of March 22* was put in issue; she retains a privacy interest in her health status following March 22, when this phone conversation took place.

The Judge also noted that Mr. Perez observed that "Beltran was hesitant when she told him about her specific medical condition," and intentionally "did not want to get personal about Beltran's specific medical issues" because such information is inherently private. *Id.* Thus it was apparent that, while Ms. Beltran was required to put her medical status at issue to some degree, this did not obviate FRE 403's instruction to weigh the probative value of the evidence against it potential prejudicial effect.

This is what Judge Etchingham did. He explained at length how this line of questioning had little probative value. ALJ Dec. at 11 n. 12. The Judge observed that Ms. Beltran "testified

without question, pause or uncertainty" concerning her phone conversation with Jose Luna, and noted that questions related to her specific medication would only "be relevant" if Ms. Beltran was "displaying some uncertainty or ill effects of medication" with respect to her ability to recall. *Id.* The Judge then went on to distinguish the authority cited by El Super on the basis that Ms. Beltran "did not exhibit any memory lapses or misrecollection" about her phone conversation with Mr. Luna on March 25 or 26, and "clearly testified that by March 25 or 26, she had full recall that Manager Luna denied her March 22 time off request." *Id.* The Judge thus concluded "that asking about her medications back ion March 2016 would not improve the record." *Id.* Thus the judge concluded that this line of questioning had little to no probative value, and given Ms. Beltran's clear privacy interest in protecting her medical information, FRE 403 *required* that the Judge not allow this line of questioning. El Super's exceptions on this point are therefore baseless.

2. The ALJ Correctly Admitted Motion Papers Related To El Super's Motion For Approval Of "Full Remedy" Consent Order (Employer Exceptions 80, 86, 88)

The Judge correctly admitted papers related to El Super's Motion because these were not settlement negotiations within the meaning of Federal Rule of Evidence 408 or the Board's regulations, but rather a formal motion intended to force the General Counsel and the Union to accept a consent order, despite their opposition. Settlement discussions are, by their very nature, voluntary attempts to resolve a dispute short of litigation. The interest in prohibiting the admission of settlement discussions is to allow parties to speak freely and frankly in trying to reach a resolution. Here, El Super was not trying to reach a resolution, but rather attempting to force a "consent order" by formal motion. All settlement discussions that were included in this formal motion were put at issue and published by the Company when it filed its motion. All of

the citations offered by the Employer are inapposite because they involve settlement discussions, not a formal motion related to a consent order.

Indeed, the Company, in a footnote in this very section of its Brief in Support, still tries to assert that the Judge was required to accept its proposed consent order. Brief in Support at fn. 8. The Employer cannot have it both ways.

This was a formal motion that El Super made in this case, and the ALJ correctly admitted these documents along with all other motions and supporting documents into the record in accordance with Board procedure.

3. The ALJ Correctly Imposed An Adverse Inference Based On The Company's Failure To Produce, Or Attempt To Produce, Former Store Manager Jose Luna (Employer Exceptions 81, 82)

It is well established under Board law that "a judge may draw an adverse inference when a party fails to call witnesses reasonably assumed to be favorably disposed toward the party." NLRB Bench Book § 16-611.5 (citing *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (adverse inference was warranted for respondent's failure to call its production manager to testify about significant disputed matters), enfd. mem. 861 F.2d 720 (6th Cir. 1988); *Parksite Group*, 354 NLRB 801, 805 (2009) (failure of respondent to call its manager who evaluated the alleged discriminatees for rehire was subject to an adverse inference; the General Counsel was not required to subpoena the manager)). Moreover, "[a] party's failure to explain why it did not call the witness may support drawing the adverse inference." *Id.* (citing *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 n. 1 (1977) (judge properly drew an adverse inference in the absence of an explanation). Additionally, the scope of an adverse inference "is properly drawn regarding any matter about which a witness is likely to have knowledge if a party

fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party. *Prop. Res. Corp.*, 285 NLRB 1105, 1105 (1987).

Here, the Judge correctly made an adverse inference based on the Company's failure to produce former Store Manager Jose Luna given that he was a central witness in this case and presumably favorably disposed towards the employer. ALJ Dec. at 19:16-20:23. The Company admitted that former Store Manager Jose Luna, the only individual besides Ms. Beltran with personal knowledge of many of the facts in this case, left employment with El Super "voluntarily." Tr. 253:1-2. Further, the Company offered no evidence indicating that Mr. Luna would not be favorably disposed towards his former Employer. Given the central role that Mr. Luna played in this case, the Company must have known that he would be a crucial witness, and the only witness that could contradict Ms. Beltran's testimony with respect to several key issues, including the March 25 or 26 phone call in which he denied Ms. Beltran's request, or address the anti-union animus he evinced in the March 29 Email.

Despite this, as the Judge noted, the Company did not even attempt to subpoena Mr. Luna. ALJ Dec. at 20:7-9. Likewise, the Company failed to present any evidence from Mr. Luna on these central issues. Significantly, as the Judge found, the Company did not show why Mr. Luna was unavailable, or offer any explanation as to why they did not compel Mr. Luna's testimony at the hearing. ALJ Dec. at 20:7-9. The Judge's adverse inference based on the Company's failure to produce this key witness was therefore entirely appropriate under the authority cited above. *See,e.g., Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

4. The ALJ Correctly Imposed An Adverse Inference Based On The Company's Failure To Produce, Or Attempt To Produce, Former Store Manager Joe Angulo (Employer Exceptions 81, 82)

The ALJ's adverse inference with respect to the Company's failure to call General Counsel Joe Angulo is even more clearly established in Board law than the inference related to Mr. Luna. ALJ Dec. at 19:16-20:23. This is because Mr. Angulo was still employed with the Company at the time of the hearing, and therefore subject to its control. Tr. 212:25. The ALJ cited substantial authority establishing that a company's failure to produce key management witnesses is grounds for an adverse inference with respect to the matters about which they would have testified. ALJ Dec. at 19:29-34 (citing *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (internal citations omitted), enfd. 861 F.2d 720 (6th Cir. 1988) ("while we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted in the instant case, where the missing witness is a member of management"). This is particularly true where the witness is an agent of a party. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). As the Board has recognized in a case that the Judge cited here, the failure of the decision maker to testify "is damaging beyond repair." *Dorn's Transportation Co.*, 168 NLRB 457, 460 (1967).

Although Judge Etchingham rejected this contention as refuted by contrary evidence and inherently implausible, El Super appears to claim that Mr. Angulo was the ultimate decision maker with respect to Ms. Beltran's vacation pay request. ALJ Dec. at 25:33-36; fn. 22. Its failure to call Mr. Angulo to testify on *the main issue* in this case is particularly telling and warrants the adverse inference that the Judge made under the authority cited above.

While the Company claims that it did not call Mr. Angulo to testify because it would have put at issue certain communications protected by the attorney-client privilege, it failed to

indicate how or why this would be the case with respect to Ms. Beltran's request. Mr. Angulo was free to avoid discussing attorney-client protected communications, and El Super's counsel could have easily avoided eliciting testimony that would have implicated protected communications. To the extent that Mr. Angulo was truly vested with ultimate authority to approve or deny routine paid time off requests, he acted as a manager and not as a lawyer when he makes those decision. He was not shielded from explaining this managerial decision just because he passed a bar exam.

III. CONCLUSION

For all of the foregoing reasons, the Employer's exceptions should be overruled, and the ALJ's recommendations should be approved.

DATED: March 21, 2018

Respectfully submitted,
GILBERT & SACKMAN
A LAW CORPORATION

By_____
Travis. S. West

Attorneys for United Food and Commercial Workers Union, Local 324

DECLARATION OF SERVICE

On March 21, 2018, I hereby certify that I electronically filed the foregoing:

CHARGING PARTY'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

with the National Labor Relations Board using the NLRB's e-filing system addressed to the Board's Office of Executive Secretary.

I also served the above document by electronic mail to:

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I declare under penalty of perjury under the laws of California that the foregoing is true and correct and was executed by me on March 21, 2018, in Los Angeles, California.

Travis West